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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

**No. 19**

LARRY GARA,
*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

## BRIEF OF PETITIONER.

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## TABLE OF CONTENTS.


| | PAGE |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Statement of the Case | 3-4 |
| Specifications of Assigned Errors | 5-6 |
| Argument: | |
| I. This Court has jurisdiction to review the determination of the courts below | 7 |
| (a) Petitioner was convicted by the unConstitutional interpretation of the Selective Service Act of 1948 and Section 12 (A) thereof in consequence of which he was deprived of his Freedom of Speech and the Free Exercise of Religion contrary to the Constitution | 7-13 |
| (b) The Courts below, in interpreting the Act involved, wholly disregarded the First Amendment to the Constitution on the theory of "Clear and Present Danter" | 14-17 |
| (c) The Act involved is unConstitutional because the terms thereof are indefinite and vague. The provisions thereof were, contrary to law, construed by the courts below against the petitioner | 17-20 |
| (d) Under the provisions of the Act involved, the Trial Court instructed the jury that petitioner may and must be convicted if his words uttered were such as "having a tendency to encourage" the violation of the Act | 20-23 |

II. Petitioner has been deprived of his liberty without due process of law in violation of the Constitution and Amendments V, VI and VIII thereof ..... 24

(a) Petitioner's conviction was based on certain utterances made following the act of the person who was allegedly counselled, aided and abetted by petitioner's utterance.....24-26

(b) Petitioner was deprived of the due process of law even though the person allegedly counselled complied with every requirement of the law.....26-27

III. The holdings of the Courts below in effect created a new crime not contemplated by the Act under which Petitioner was charged. The Regulation under the Act, in attempting to enlarge upon the Act becomes unConstitutional.....27, 28

Conclusion ..... 29

## Table of Cases Cited.

Bridges v. California, 314 U. S. 252.....16, 17
Cantwell v. Connecticut, 310 U. S. 296..... 11
Cole v. Arkansas, 68 S. Ct. 514..... 25
Connally v. General Construction Co., 296 U. S. 385..17, 28
DeJonge v. Oregon, 299 U. S. 353..... 17
Fogel v. United States, 335 U. S. 865.....24, 25
Gara v. United States, 178 Fed. (2d) 38..... 1
Girourard v. United States, 328 U. S. 61..... 12
Gwyer, M. L., 5 J. of Pub. Ed. 404-409..... 29
Hartzell v. United States, 322 U. S. 680.....18, 20
Herndon v. Lowry, 301 U. S. 242..... 17
Keegan v. United States, 325 U. S. 478..... 7
Kovac v. Cooper, 336 U. S. 77.....10, 11
MacIntosh v. United States, 283 U. S. 605..... 11
Minersville S. D. v. Gobitis, 310 U. S. 586..... 13
Murdock v. Pennsylvania, 319 U. S. 105..... 10
Musser v. Utah, 333 U. S. 95..... 17
People v. Grant, 242 N. Y. App. Div. 310..... 28
Schwimmer v. United States, 279 U. S. 644..... 11
Summers, In Re, 325 U. S. 561..... 12
Taylor v. Mississippi, 319 U. S. 583.....11, 27
Terminiello v. Chicago, 69 S. Ct. 894.....20, 21, 22, 23
Thornhill v. Alabama, 310 U. S. 88..... 23
U. S. v. Cohen Grocery Co., 255 U. S. 81.....17, 28
U. S. v. Eaton, 144 U. S. 677..... 28
U. S. v. Grimaud, 220 U. S. 506..... 28

U. S. v. Norton, 179 Fed. (2d) 527.....26, 27
Viereck v. United States, 318 U. S. 236.....18, 19, 20, 28
West Virginia State Board v. Barnette, 319 U. S. 624..
.....10, 13, 27
Winters v. New York, 333 U. S. 507..... 17

OTHER AUTHORITIES CITED.

Chaffee, Zechariah, Free Speech in the U. S..... 15
Cohen, Myer, Selected Supreme Court Decisions....15, 16
Holmes, Oliver Wendell, Collected Legal Papers..... 15
Meiklejohn, Alexander, Free Speech and Its Relation to Self Government.....14, 15, 16
Regulations under the Selective Service Act of 1948:
Rule 611.6 (d)..... 28
Rule 642.31 ..... 26
Selective Service Act of 1948 as Amended:
Section 3 .....19, 27
Section 12-(A).....4, 5, 6, 7, 8, 14, 17, 19, 20, 21, 25
United States Constitution:
Amendment I .....5, 8, 9, 10, 11, 12, 14, 15, 16, 17, 22
Amendment V .....5, 14, 24, 26
Amendment VI .....5, 24, 26
Amendment VIII .....5, 24, 26
Section III ..... 23
28 U. S. Code, Section 1254, No. 1..... 1

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## BRIEF OF PETITIONER.

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### OPINION BELOW.

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The opinion of the Court of Appeals for the Sixth Circuit is printed on pp. 201 to 207 of the Transcript of Record and is reported at 178 Fed. 2d 38.

### JURISDICTION.

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The jurisdiction of this court is invoked under 28 U. S. C., Sec. 1254(1).

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 28, 1949 (Tr. 201). A

Petition for Rehearing was filed on December 19, 1949 (Tr. 208-216) which Petition was denied on January 16, 1950 (Tr. 216).

A Petition for Writ of Certiorari was filed on February 15, 1950 and the same was granted on April 3, 1950. By order of this court the case was transferred to the Summary Docket (Tr. 216).

## STATEMENT OF THE CASE.

On September 10, 1948, the date set for his registration, Charles Ray Rickert, a Divinity student at Bluffton College, appeared before his Draft Board and gave the Clerk his name, address and year of his birth. He refused to give further information or to sign his draft card because, as he stated, such affirmative acts would be contrary to his religious belief. Rickert also stated, orally and in writing, that his decision to contribute nothing affirmative to his registration was irrevocable (Tr. 21, 23, 24, 97 and 98).

Ten days later, or about the 20th of September, Rickert first met Petitioner Gara, the Dean of Men, at his College (Tr. 100, 101). From that date on and up to November 8, 1948, when Rickert was arrested, various conversations were held between the two. They discussed conscientious objections to war; the Christian duty of religious practices, and "the need of being inwardly prepared" to take the consequences of one's action. Gara, having learned that Rickert was inwardly prepared, approved the latter's act of following the dictates of his conscience (Tr. 114, 125, 138 and 142). On November 8, 1948, *i. e.*, the date of Rickert's arrest, Gara told him "Stand by your convictions. Don't let them coerce you into registering," or "Don't let them coerce you into going against your conscience," or some words to the same effect (Tr. 29, 70, 71 and 127).

Petitioner Gara was indicted and the indictment filed before the District Court of the Northern District of Ohio charged that: "On or about the 8th day of November, 1948 at Bluffton, in the Northern District of Ohio, Western

Division, Larry Gara knowingly counselled, aided and abetted one Charles Ray Rickert to refuse or evade registration as required by the *Selective Service Act* of 1948" (Tr. 2).

Among the instructions of the Trial Court given to the jury were that:

> "In further analyzing the Count of the Indictment, you will note that it provides that Larry Gara knowingly counselled, aided and abetted. To counsel means to advise, to give advice to, to offer an opinion worthy or expedient to be followed. The words 'aiding' and 'abetting' are not synonymous. To abet is to encourage, counsel, incite or instigate the commission of a crime. To aid is to support" (Tr. 168).

The Trial Court also instructed the jury that:

> "It is the apparent contention of the defendant that he did not counsel, aid or abet Rickert in his refusal to register on September 10, 1948, but merely that he supported him in his attitude after he, Rickert, had decided in his own mind not to register because of his religious beliefs or the dictates of his own conscience. You are instructed that if what the defendant knowingly said to Rickert on the 8th day of November, 1948 under the circumstances then and there present, was of such a nature that it had a tendency to encourage or cause Rickert to continue his refusal to register under the *Selective Service Act* of 1948, whether or not it actually had that effect, it would constitute an offense within the meaning of this Act, as charged in the Second Count of the Indictment" (Tr. 169).

(The Second Count of the Indictment was the only one on which Petitioner was tried since Count One of the Indictment was voluntarily dismissed by the government prior to the trial (Tr. 3).)

## SPECIFICATION OF ASSIGNED ERRORS.

Petitioner intends to urge all the points which were first raised by him in the Trial Court and subsequently in the Court of Appeals for the Sixth Circuit. These points are:

1. The *Selective Service Act* of 1948 and Section 12(A) thereof are unconstitutional because:

   (a) As the same were construed by the Trial Court and by the Court of Appeals, petitioner was deprived of his freedom of speech and the free exercise of religion both guaranteed by the First Amendment of the Constitution.

   (b) The First Amendment of the Constitution was wholly disregarded on the basis of the theory of "Clear and Present Danger."

   (c) The Act is too indefinite and vague in its terms. It was not strictly construed in favor of the petitioner as required by the law.

   (d) The Trial Court instructed the jury to convict, using the "tendency to encourage" test. Such test was held by this court to be inconsistent with the Constitution.

2. Petitioner's conviction deprives him of the due process of law in violation of Amendments V, VI and VIII of the Constitution in that:

   (a) He was found guilty of counselling, aiding and abetting refusal to register when the non-registrant's refusal occurred before the alleged counselling, aiding or abetting was even physically possible.

   (b) Petitioner was convicted of counselling, aiding, or abetting refusal to register while in fact the non-registrant complied with whatever the law required him to do: namely, to "present himself for and submit to registration."

3. The holding of the Trial Court and of the Court of Appeals that the regulations under the Act provide for a "continuing duty" of the registrant to present himself for and submit to registration is contrary to the provisions of the *Selective Service Act* of 1948. The ruling of the Courts below thus attempted to create a new crime for every moment of the non-registration. Such holding is invalid.

## ARGUMENT

### I.

**(a) The Selective Service Act of 1948 and Section 12(A) Thereof Are Unconstitutional Because as the Same Were Construed by the Trial Court and the Court of Appeals, Petitioner Was Deprived of His Freedom of Speech and Free Exercise of Religion, Both Guaranteed by the First Amendment of the Constitution.**

The *Selective Service Act* of 1948 and the part thereof under which petitioner stands convicted reads: "Any person who knowingly counsels, aids or abets another to refuse or evade registration • • • " shall be punished as provided by the Act. The Act of 1948 in effect amended the Act of 1940 in that the later law made counselling, aiding or abetting "refusal to register" a crime, but previously only counselling, aiding or abetting evasion was so made criminal. In fact, under the prior Act, this court held in *Keegan v. United States,* 325 U. S. 478 that counselling "refusal" was not a criminal act. In view of the changed wording of the 1948 statute, this is a case of first impression which requires this court's careful consideration.

In advising and instructing the jury, **the Trial Court in effect held that the petitioner could and must be convicted for telling one of his students to follow his conscience.** That this was the instruction is evident when we recall that the evidence showed and the admission of petitioner demonstrated that on November 8, 1948, he told his student Rickert "Stand by your convictions; don't let them coerce you into going against your conscience;" (Tr. 29, 70-71 and 127). On the basis of such admission and evidence the Trial Court instructed the jury;

" • • • that if what the defendant knowingly said to

> Rickert on the 8th day of November 1948 under the circumstances then and there present was of such a nature that it had a tendency to encourage or cause Rickert to continue his refusal to register * * * whether or not it actually had that effect, it would constitute an offense within the meaning of this act * * * " (Tr. 169).

The above is a dangerous instruction and if it is permitted to stand, it will become a dangerous law, wholly negating the First Amendment of the Constitution which up to the time of the trial court's instruction to the jury in Toledo, Ohio protected freedom of speech. It is a dangerous instruction and if it is permitted to stand, becomes a dangerous law because in effect it will take away the Constitutional protection of free exercise of religion. It is dangerous because the record is clear that the student Rickert refused,—due to his deep-seated religious conviction and carrying on in accordance with such a conviction—to register for the draft. Petitioner's statement, following Rickert's refusal by two months, could at worst be interpreted as an advice against abandoning one's religious freedom while confronted by the coercion of imprisonment.

Section 12(A) of the Act, interpreted by the Trial Court, makes everyone a candidate for prison who believes and expresses a belief in following one's conscience—particularly when that conscience dictates certain conduct in exercising one's religious belief. The instruction complained of attempts to take away the Constitutional protection both from Freedom of Speech and Free Exercise of Religion.

The justification to uphold the trial court's instruction is expressed by the Court of Appeals in a sentence which we are forced to admit we are unable to understand. The Appellate Court stated in the concluding paragraph of its opinion that Petitioner:

> "* * * may attack the Selective Service Act of 1948

> from every platform in America with impunity, but he cannot under the guise of free speech nullify it by disobedience to its express provisions."

We are at a loss to understand what the Court meant by the term "the guise of free speech". Is it meant that speech remains free in this country only as long as it is ineffective, but as soon as it threatens to present such weighty argument that it may overcome a preconceived idea,—be it a law or an opinion,—then it is taken out from under the protection of the First Amendment of the Constitution? It is a strange and dangerous idea—one which we hope cannot stand in this country.

The Court of Appeals in upholding the conviction of Petitioner, takes the position that the understanding of the members of Congress as to the needs of National Defense, from time to time is a paramount and exclusive determinant to which all others, including the prohibition contained in the First Amendment, must yield. The opinion herein appealed from says Congress:

> "• • • has the obligation, under the Federal Constitution, of providing for the common defense. In the Preamble to the Selective Service Act of 1948 under the Congressional declaration of policy, it is stated 'the Congress declares that an adequate armed strength must be achieved and maintained to insure the security of this nation'. We take judicial notice of the existence of the so-called 'cold war' which in the view of Congress necessitated this peacetime draft."

As we read the opinion of the Court of Appeals, it is apparent therefrom that that court held that as against the wisdom of the members of Congress, the provision against restriction on religious freedom and freedom of speech contained in the First Amendment, must take second place. We believe that this is an error so fundamental that it threatens to negate the whole of the Constitutional basis

of this country's government. It is an error because it is an anomoly to believe that the rights originally belonging to the sovereign—that is the people—which were by positive words retained by the people; the restrictions which were positively placed upon Congress, may be destroyed and the powers may be taken and returned to the sovereign at the pleasure of Congress. Such was not contemplated by those who wrote the Constitution and particularly when they framed the First Amendment which says without any equivocation, that **Congress shall make no laws** * * * *restrictive of the free exercise of religion or interfering with freedom of speech.* The record in this case clearly discloses that both Rickert who refused to register and petitioner who thought (and expressed the thought) that Rickert ought not to permit anyone to coerce him against his conscience, were acting because of deep and confirmed moral and religious beliefs. Such an act was more than once considered by this court as being protected by the First Amendment.

In the case of *West Virginia State Board* v. *Barnette*, 319 U. S. 624, the protection of the First Amendment is extended to the right of the citizen to refuse to salute the American Flag, if such refusal is because of his religious practice. Because the phrase "civil disobedience" is apparently in the mind of some as an act not to be contemplated under any circumstances, it is proper to point out that the *Barnette* case refers approvingly to the action of the early Quakers, who refused to doff their hats to civil authority—a refusal which in those days and under the circumstances was considered an act of civil disobedience.

In the case of *Murdock* v. *Pennsylvania*, 319 U. S. 105, the Supreme Court upheld the right of individuals to distribute religious pamphlets even though such distribution was charged against them as creating disturbance.

In the case of *Kovacs* v. *Cooper*, 336 U. S. 77, the Su-

preme Court gave an answer to those who wrongly claim that the First Amendment protects religious beliefs as long as those beliefs are not carried into practice, contrary to ordinances, statutes or regulations. In that case, the Supreme Court said of an ordinance which attempts "censorship of speech or religious practices before permitting their exercise the Constitution forbids their enforcement." In this case, the practice and not just the belief was put under the protection of the First Amendment. It was said in the *Kovacs* case the Constitution forbids the enforcement of a law which attempts to interfere with or censor a religious practice.

In the case of *Cantwell* v. *Connecticut*, 310 U. S. 296, the Supreme Court upheld the right of members of Jehovah's Witnesses to play a victrola record which attacked Catholicism, even in streets where the majority of the people were Catholics, in which case the lower court felt that such an act of the Jehovah's Witnesses was a provocation.

In the case of *Taylor* v. *Mississippi*, 319 U. S. 583, the right to distribute literature by pacifists directed against the draft law and against wars, was upheld.

The minority decision in the case of *Schwimmer* v. *United States*, 279 U. S. 644, is today the decision of the majority. Therefore, the minority opinion of Justice Holmes is pertinent. He said:

> "If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate * * * the Quakers have done their share to make the country what it is."

In the case of *MacIntosh* v. *United States*, 283 U. S. 605, the minority opinion was later adopted by the majority.

(See *Girourard* case, below.) There Chief Justice Hughes said:

> "• • • the history of the struggle for religious liberty, the large number of citizens of our country, from the very beginning who have been unwilling to sacrifice their religious convictions, and in particular, those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be allegiance to the will of God. • • •"

and further:

> "One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God • • • and • • • freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field."

The minority opinion in the case of *In Re Summers*, 325 U. S. 561, may be also cited, since we submit that the minority opinion of the four justices therein is now supported by the majority in the case of *Girourard* v. *United States*, 328 U. S. 61. In this latter case the court said:

> "• • • The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. As we recently stated in *United States* v. *Ballard*, 322 U. S. 78, 86, 'Freedom of

thought, which includes freedom of religious belief, is basic in a society of free men. *Board of Education* v. *Barnette*, 319 U. S. 624.' "

Petitioner's position is clearly covered by the dissenting opinion of Chief Justice Stone in the *Minersville School District* v. *Gobitis* case, 310 U. S. 586, where it was said:

> "I cannot say that government here is deprived of any interest or function which it is entitled to maintain at the expense of the protection of civil liberties. * * * The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit. * * * They presuppose the right of the individual to hold such opinions as he will and to give them reasonably free expression. * * * The very essence of the liberty which they guaranty is the freedom of the individual from the compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guaranties are to have any meaning they must, I think, be deemed to withhhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion. This seems to me no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will."

The above opinion of the minority, became that of the majority Court in the case of *Board of Education* v. *Barnette* (*supra*).

It is hard, if not impossible to believe that in face of the decisions hereinabove cited, this court would agree with the Court of Appeals that the instruction of the Trial Judge, which in effect directed the petitioner's conviction, may stand.

**(b) The Selective Service Act of 1948 and Section 12(A) Thereof, Are Unconstitutional Because Both the Trial Court and the Court of Appeals Wholly Disregarded the First Amendment of the Constitution on the Theory of "Clear and Present Danger."**

The opinion of the Court of Appeals in pointing out that Congress had the right and the duty to make the *Selective Service Act* of 1948, concluded that the Trial Court was justified in giving his instructions as he did on the ground that "we take judicial notice of the existence of the so-called 'cold war' which in the view of the Congress necessitated this peacetime draft." We are not here to argue whether or not Congress had the right to put the Act here involved on the books, but we argue that neither cold war nor hot war nor any war, justifies the elimination of the Constitutional protection heretofore extended to freedom of speech and freedom of religion. In the opinion of the Court of Appeals, there is an APPARENT justification for upholding the Trial Court and that apparent justification is derived from the precept of "clear and present danger." We do not believe that the precept ought to apply as a whole and we further believe that if it is applied, it cannot apply to restrict religious freedom. So it was proven by the clear exposé of Professor Alexander Meiklejohn in his book *Free Speech* (Harper & Brothers, Publishers, 1948).*

Professor Meiklejohn, in analyzing and comparing the First and Fifth Amendments to the Constitution concludes that the intent was that the First Amendment provide an *unlimited guarantee of freedom* of speech and obviously of the free exercise of religion. He says that the First Amendment:

"* * * correlating the freedom of speech in which

* Taken from the above book with the kind permission of the author.

it is interested with the freedom of religion, of press, of assembly, of petition for redress of grievances, places all these alike beyond the reach of legislative limitation—beyond even the due process of law. With regard to them, Congress has no negative powers whatever."

Professor Meiklejohn, discussing the basis of the Constitution: namely, the compact between the people and the government,—concludes that **the freedoms guaranteed by the First Amendment and the injunctions directed to Congress, are "The basic postulates of a society which is governed by the votes of its citizens."**

It appears that we are almost ready to accept that the First Amendment does not mean what it says, and we are almost grateful that there is a certain limitation set on the power of Congress as to the extent that our basic freedoms may be restricted. We are almost ready to assume that Justice Holmes' winged phrase of "clear and present danger" is something generally accepted, when in fact Justice Holmes, its author himself, supported by Justice Brandeis, was clearly aware that putting a restriction on this restriction is not only needed but is required. While in the first instance the rule of "clear and present danger" was presented without any qualification, subsequent decisions added qualifying phrases agreeing that dangers in themselves do not justify the suppression of basic rights guaranteed by the First Amendment. The first judicial interpretation was that an emergency will justify the application of the "clear and present danger" rule. Subsequent qualifications went farther and stated that it may be applied only when the evil to be suppressed is grave, etc. See Oliver Wendell Holmes, *Collected Legal Papers* (Harcourt, Brace and Howe, New York, 1920). Also see Zechariah Chaffee, Jr., *Free Speech in the United States* (Harvard University Press, 1942) and see Myer

Cohen, *Selected Supreme Court Decisions* (Harper & Bros., 1937).

It is hard if not impossible to disagree with Professor Meiklejohn that **accepting the "clear and present danger" theory means in effect that "The compact of self-government has been ignored or repudiated."** (Opus cited, p. 89.) It is hard if not impossible to disagree with him that **the unabridged freedom guaranteed by the Constitutional Amendments, "is the rock on which our government stands. With that foundation beneath us, we shall not flinch in the face of any 'clear and present'—or even terrific danger."** (Opus cited, p. 91.)

We do—as did Justices Holmes and Brandeis—disagree with the "clear and present danger" theory. Nevertheless we may assume—without admitting it—that such theory is constitutionally proper and justified. However, even with such assumption, it is clear that the defendant's right to free exercise of his religion, cannot be restricted in the instant case.

The rule of "clear and present danger" cannot in the case of petitioner deprive him of the protection of the First Amendment. It would be hard, if not impossible, to argue that his statement to Rickert is to be an exception to the First Amendment because it represents a clear and present and grave danger to the state security. The rule is laid down by the Supreme Court of the United States in *Bridges* v. *California*, 314 U. S. 252, as follows:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally.

> It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

It seems to us that it is hard if not impossible to argue that petitioner's statement—made on November 8 to one who on September 10 refused to register—to the effect that he ought not be coerced to violate his conscience is a substantive evil. Nor can it be said that it is extremely serious nor do we believe that the degree of the imminence of the danger to the state is extremely high. We further submit that the statement of petitioner so made on November 8 is clearly within the protection of the First Amendment, and, therefore, it was erroneous to find him guilty and it was further an error on the part of the Court of Appeals to affirm the conviction.

**(c) The Selective Service Act of 1948 and Section 12(A) Thereof Are Unconstitutional Because the Terms Thereof Are Indefinite and Vague and, as Construed, Were Applied Against the Petitioner Contrary to the Requirements of the Law.**

The law is elementary and the cases are legion holding that criminal statutes, such as the one here involved, that do not furnish guideposts as to what is prohibited conduct, are void for vagueness. See *Musser* v. *Utah*, 333 U. S. 95; *Winters* v. *New York*, 333 U. S. 507; *Herndon* v. *Lowry*, 301 U. S. 242; *De Jonge* v. *Oregon*, 299 U. S. 353; *U. S.* v. *L. Cohen Grocery Co.*, 255 U. S. 81; *Connolly* v. *General Construction Co.*, 269 U. S. 385 and other cases cited therein.

Petitioner complains that the statute being a criminal one, was not strictly construed in his favor, as required by the elementary law. This rule of law was not followed

by the Trial Court nor was it considered by the Court of Appeals, even though the record clearly discloses that the statute was interpreted during the trial in such a manner that it became a "catch all." The statute as we understand it was intended as a draft act and was not intended, as the Trial Court did, to police petitioner's speech. The Trial Court's instructions to the jury, which in effect made it a crime to give (as petitioner did) moral comfort to one who has already irrevocably decided his course of conduct, shows with striking clarity that the statute was construed so broadly that it goes beyond all previously accepted yardsticks. This Court in *Hartzel* v. *U. S.*, 322 U. S. 680; 64 S. Ct. 1223, went on record against permitting the interpretation of a statute so broadly that it may become a "catch all." This Court is well familiar both with the evidence and with the opinion written by the late Justice Murphy. Nevertheless, it may be proper to recall a short paragraph from that case. This Court was

> "* * * not unmindful of the fact that the United States is now engaged in a total war for National Defense, and that total war of the modern variety cannot be won by a doubtful, disunited nation in which any appreciable factor is disloyal. For that reason, our enemies have developed psychological warfare to a high degree in an effort to cause unrest and disloyalty. Much of this type of warfare takes the form of insidious propaganda in the manner and tenor displayed by petitioner's pamphlets * * *. But the mere fact that such ideas are enunciated by the citizen is not enough by itself to warrant a finding of a criminal intent to violate Section 3 of the *Espionage Act* * * *. An American citizen has the right to discuss these matters either by temperate reasoning or by immoderate and vicious invective without running afoul of the Espionage Act of 1917."

The decision of this court and its disapproval of the government's argument in the case of *Viereck* v. *U. S.*,

318 U. S. 236; 63 Supreme Court 561, is quite apropos here where the government argued to the jury and to the Trial Court that unless petitioner is restricted in his freedom of speech, the *Selective Service Act* becomes a "half-way measure." This court on that score had the following to say in the *Viereck* case:

> "The Government argues that the statute would have been a 'half-way measure' had it not required, or at least authorized the Secretary to require the registrant to reveal the propaganda which he put out other than on behalf of his foreign principal * * *."

And it further said:

> "Even though the specific restriction of Section 3 (c) were due to defective draftsmanship or to inadvertence, which hardly seems to be the case, men are not subjected to criminal punishment because their conduct offends our patriotic emotions or thwarts a general purpose sought to be effected by specific commands which they have not disobeyed. Nor are they to be held guilty of offenses which the statutes have omitted, though by inadvertence, to define and condemn. For the courts are without authority to repress evil save as the law has proscribed it and then only according to law."

It is apparent that if Congress intended by the *Selective Service Act* of 1948 to police freedom of speech it should have so stated. Congress has not done so and, therefore, the Trial Court was in error when he instructed the jury to convict petitioner because he admittedly, two months after Rickert refused to register, encouraged him in the hard days to come by standing by with his sympathy and in Christian brotherhood. Such an overt act on the part of petitioner is not forbidden by the statute because one cannot substitute one act not forbidden for one that is forbidden. So it was said by this court in the *Viereck* case:

"We cannot read that phrase as though it had been

written 'while an agent' or 'who is an agent'. The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem."

In the face of the ruling of this court in the *Viereck* and in the *Hartzel* cases, the conviction of petitioner cannot stand.

**(d) The Selective Service Act of 1948 and Section 12(A) Thereof Are Unconstitutional if the Trial Court's Instruction as to Petitioner's Words "Having a Tendency to Encourage," Is Upheld as Sufficient for Conviction.**

Petitioner complained in the Trial Court and again before the Court of Appeals against the instructions which made the "tendency" of petitioner's statement a justification for conviction. The Trial Court said to the jury that:

> "You are instructed that if what the defendant knowingly said to Rickert on the 8th day of November 1948 under the circumstances, then and there present, was of such a nature that it had a tendency to encourage or cause Rickert to continue his refusal to register under the *Selective Service Act* of 1948, whether or not it actually had that effect, it would constitute an offense within the meaning of this Act, as charged in the Second Count of the Indictment" (Tr. 173).

In the case of *Terminiello* v. *Chicago*, 69 S. Ct. 894, this Court, we believe, clearly rejected the "tendency" test. In that case the instructions of Judge McCormick of the Municipal Court of Chicago pertaining to the interpretation of the words "breach of peace" as used in the Chicago ordinance stated:

> "Misbehavior may constitute a breach of peace if it

> stirs the public to anger, incites dispute, brings about a condition of unrest or creates a disturbance or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."

This Court, analyzing the instruction, found that the ordinance, as construed by the Trial Court's instruction, invaded the province of supposition in that, "it permitted conviction of petitioner if his speech stirred people to anger, incited public dispute or brought about a condition of unrest," and disagreeing with such interpretation, held that, "A conviction resting on any of those grounds may not stand."

The Court of Appeals before which we argued the *Terminiello* case (*supra*) concluded that the same has no application to the "tendency" test in the case as bar. That court said:

> "The cited case involved an ordinance which as construed by the Trial Court directly invaded freedom of speech. The *Selective Service Act* does not even purport to enter the field of restriction of speech or of publication."

We agree, as we said before, with the second part of this statement: namely, that the Act under which petitioner was convicted, "does not even purport to enter the field of restriction of speech * * *." However, we disagree with the Court of Appeals when it finds that while the *Terminiello* case did, the present one does not invade freedom of speech.

One wonders whether or not the conviction of petitioner can stand when the jury was instructed, if not commanded, to convict him because he had said something which, "Had a tendency to encourage or cause Rickert to continue his refusal to register * * *." We wonder whether or not the Trial Court intended, by his charge to the jury and the Court of Appeals by its opinion upholding the Trial Court,

to challenge the Freedom of Speech provision of the Constitution when it was added to the instruction that it is not even necessary that petitioner's speech has the effect "to encourage", but he may be convicted if it had no such effect. The conviction is just about mandatory under the instructions if petitioner's speech had, "THE EFFECT OF HAVING A TENDENCY TO ENCOURAGE." If such is the rule of the law, then we are indeed treading perilously close to the total elimination of Freedom of Speech.

As we read this Court's decision in the *Terminiello* case, the Court of Appeals was duty-bound to reverse petitioner's conviction, if on no other than the ground of the above instruction. This Court said:

> "The vitality of civil and political institutions in our society depends on free discussion, as Chief Justice Hughes wrote in *De Jonge* v. *Oregon*, 299 U. S. 353, 365, 57 S. Ct. 255, 260, 81 L. Ed. 278, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes."
>
> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky* v. *New Hampshire, supra,* 315 U. S. at pages 571-572, 62 S. Ct. at page 769, 86 L. Ed. 1031, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or

unrest. (See *Bridges* v. *California*, 314 U. S. 252, 262, 62 S. Ct. 190, 193, 86 L. Ed. 192, 159 A. L. R. 1346; *Craig* v. *Harney*, 331 U. S. 367, 373, 67 S. Ct. 1249, 1253, 91 L. Ed. 1546.) There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."

The instruction complained of permits—nay it directs—conviction if a speech has a "tendency to encourage" someone to do certain things. Such an instruction strikes deeply into the heart of the Constitutionally protected acts of the sovereign,—of the people. As a matter of fact, the Trial Court's instruction is contrary to the whole line of decisions pertaining to freedom of speech as cited in *Thornhill* v. *Alabama*, 310 U. S. 88; 60 S. Ct. 736, and other cases. While the Supreme Court in the *Terminiello* case expressed the opinion that free speech may best serve its high purpose "when it induces a condition of unrest, creates dissatisfaction with conditions as they are or even stirs people to anger", petitioner's speech to Rickert did not even do as much. He created no unrest, but rather gave Rickert peace of mind when he learned that others agree with his Christian attitude of following the dictate of conscience. It is very unlikely that petitioner created dissatisfaction in the mind of Rickert but rather his sympathy made him willing to accept and thus become satisfied with the prospect of imprisonment meted out to him because he stood by his religious practice. Under no circumstances can it be said that petitioner either intended or did cause Rickert to be stirred to anger. Therefore, we say that there will be small vestige left of our freedom of speech if a man, as petitioner, can be convicted for stating anything which in the mind of the jury will appear as having "a tendency to encourage" someone else "to continue his refusal to register."

## II.

**(a) Petitioner's Conviction Deprives Him of Due Process of Law in Violation of the Amendments V, VI and VIII of the Constitution in That He Was Found Guilty of Counselling, Aiding or Abetting Refusal to Register Even Though the Nonregistrant's Refusal Occurred Before Such Alleged Counselling, Aiding or Abetting.**

The record is clear that while Rickert finally and irrevocably refused to register on September 10, 1948, he did not even meet petitioner before the 20th of September of that year. It is obvious from the facts that to convict petitioner, it was necessary to give a retroactive effect of his words so that if he did counsel Rickert during their first meetings on the 20th, that that effectively aided, and abetted Rickert to make up his mind ten days earlier. The Trial Court did not feel that such a retroactive effect could be assigned to petitioner's words. Therefore, he departed from the Indictment and substituted a new offense. The Indictment on which petitioner was tried and convicted says that he, on the 8th of November 1948, "knowingly counselled, aided and abetted one Charles Ray Rickert to refuse or evade registration. * * *" The Indictment does not charge that petitioner counselled Rickert TO CONTINUE to refuse to register. Yet, this is what he was convicted of. He could not possibly be convicted of counselling Rickert to refuse registration because petitioner did not even know Rickert at the time when the refusal to register occurred on the 10th of September. Here petitioner was charged with one crime (if his act be a crime) and convicted of another. This is not permissible as this Court said in *Fogel* v. *U. S.*, 335 U. S. 865; 69 S. Ct. 136.

In that case, Fogel was indicted and convicted for

failure to register for the Selective Service and his Motion for a New Trial on the ground of newly discovered evidence, was denied. On appeal, the Court of Appeals affirmed and Fogel's first Petition for a Writ of Certiorari was denied. Subsequently, however, this court reversed referring to the record, 167 Fed. 2d 763, that being the opinion of the Court of Appeals where two of the judges affirmed the District Court's denial of a new trial. It appears to us that this Court's reversal and the granting of the Motion for a New Trial is bottomed on the dissenting opinion of the sole judge—Justice Sibley—which opinion is pertinent here. The District Court in denying the Motion for a New Trial agreed with the Government's Attorney, that even though Fogel was born in 1894 instead of as alleged in 1898, nevertheless, because of the subsequent duty to register for the older age limit he "could be put on trial again, if we granted a new trial, under the Indictment as it now exists," Justice Sibley stated:

> "Fogel was not indicted nor tried for failing to register on that date or on that basis and on review by the District Judge, and in this Court the charge cannot be thus shifted to sustain the conviction."

This Court agreed with Justice Sibley in disapproving the shifting of the charges in *Cole* v. *State of Arkansas*, 68 S. Ct. 514; 167 Fed. 2d 763. As our record discloses Rickert, was not indicted nor was he tried nor was he convicted for his failure to register on November 8, 1948. He was not indicted for his failure to change his mind on November 8, but was indicted, tried and convicted for his refusal to register on September 10. It is by means of a shifting of the grounds of the indictment that petitioner could be indicted, tried and convicted on the ground that his words spoken on November 8 had the tendency to encourage Rickert to *continue his refusal to register.*

In a criminal case it needs but little argument that due process of law requires that a man cannot be convicted of a crime with which he was not charged at the outset. To permit such a practice catches the defendant by surprise and puts him in a position to have to defend himself against the charge previously unknown to him. Here the shifted charge was not known to petitioner until the instructions of the Trial Court were given and, in consequense, he had not even the opportunity to attempt to bring in evidence against the accusation leveled against him the first time in the instructions. We submit that petitioner's conviction under the facts and the law cannot be upheld.

**(b) Petitioner Is Deprived of Due Process of Law Since He was Convicted of Counselling Refusal to Register While in Fact the Nonregistrant Complied With Whatever the Law Required Him To Do.**

There is a conflict between the decisions of the several Circuit Courts as to the requirement of a person who is subject to the Act. The law says that a person of a certain age group is to "present himself for and submit to registration." The record here discloses that Rickert—petitioner's counselee—went to his draft board, gave his name, but refused to do any positive act towards registration. Under those circumstances, the Court of Appeals for the Second Circuit (L. Hand, Swan and Clark C. J. S.) in *U. S.* v. *Norton*, 179 F. 2d 527, found that Norton, who did exactly what Rickert did in this case, had complied with the law. Neither the statute nor the regulations thereunder make it an offense to refuse to sign the registration card. Rule 642.31 expressly provides that if a registrant refuses to give information or refuses to sign his name, the Board shall get the information from other sources, shall sign his name in lieu of

him and thus shall complete the registration. The Court in the *Norton* case (*supra*) said:

> "The regulation having provided a substitute for registrant's signature, we believe that the substitution was meant to serve for all purposes including the condoning of the refusal * * * we conclude that the crime for which he was indicted was not proven."

Under the Norton decision, Rickert ought not have been found guilty of any crime and he may not have been, but for the fact that he pleaded guilty. Nevertheless, the petitioner has the right to ask the court for its determination whether or not he can be found guilty of counselling, aiding and abetting Rickert to commit a crime which, in fact, was not committed by Rickert.

In the case of *Taylor* v. *Mississippi*, 319 U. S. 583, it was held by this court that since refusal to salute the flag was not a crime (following *West Virginia* v. *Barnette*, 319 U. S. 624) in consequence, counselling refusal to salute cannot be held a crime either.

## III.

**The Holding of the Trial Court and the Court of Appeals That the Regulations Under the Act Provide for a "Continuing Duty" by the Registrant to Present Himself and Submit to Registration, Attempts to Create a New Crime for Every Moment of the Nonregistration Period.**

Section 3 of the Act states that men shall present themselves "at such time or times and place or places, and in such manner as shall be determined by proclamation of the President and rules and regulations prescribed hereunder." (U. S. C. 50, App., sec. 452.) By proclamation of the President of June 20, 1948, dates were set from August 30th to September 20th, 1948, for registration of separate age groups. On the date fixed for his age group

Rickert presented himself to his local board, and it was then that whatever refusal he offered was completed. Regulations were also promulgated under the Act, Reg. 611.6 (d) which provides:

> "The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be."

This regulation is the key to the conviction of petitioner. The lower court appears to hold that what might otherwise be sympathy with a person who had previously broken the law, becomes counselling further law violation because of the "continuing duty" to register. This means that the regulation has made each day of refusal of registration a separate crime. A person who refused for 30 days would be subject to imprisonment for 150 years and fine of $300,000, contrary to the obvious intendment of the statute.

It is fundamental law that only Congress can create a crime and fix its punishment. Congress may provide that violation of administrative rules is a crime; but the administrative agency may not create a crime nor add to the penalties fixed by Congress. Regulation 611.6 (d) fixes a new crime (continuing refusal to submit to registration) and a new penalty (separate penalty for each day), contrary to law:

*Viereck* v. *United States*, 318 U. S. 236 (1943).

*United States* v. *Grimaud*, 220 U. S. 506 (1911).

*United States* v. *Eaton*, 144 U. S. 677.

*People* v. *Grant*, 242 N. Y. App. Div. 310, 267 N. Y. 508 (1935).

*United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921).

*Connolly* v. *General Construction Co.*, 296 U. S. 385 (1926).

The English rule is to the same effect as pleaded by us:

> "The Act may confer the power of making regulations and go on to provide that a breach of regulations so made shall be a punishable offense; but no regulations could themselves create offenses or impose penalties." *M. L. Gwyer*, 5 J. of Pub. Ad. 404, 409.

**Conclusion.**

This Petitioner respectfully asks that the judgment of the United States Court of Appeals for the Sixth Circuit may be reversed by this court and that his conviction may be set aside as a deprivation of petitioner's Constitutional rights.

Respectfully submitted,

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